AXA Affin General Insurance Bhd v K Thanarajah a/l Kanagaratnam

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-83–02 OF 2014
SU GEOK YIAM J
24 JUNE 2016

Insurance — Subrogation — Property damage insurance — Property damaged in massive landslide — Insurance payout received by insured — Insured also receiving damages for property damage from civil suit — Whether insurer entitled to recover insurance payout from insured pursuant to subrogation clause — Effect of subrogation clause

The plaintiff was an insurance company. The defendant had purchased an insurance policy ('the policy') from BH Insurance (M) Bhd. The policy was intended to give protection to the plaintiff against damage to his house at Bukit Antarabangsa, Ampang, Selangor. The sum insured was RM555,000. Subsequently, the plaintiff took over BH Insurance (M) Bhd and the defendant became a policy holder of the plaintiff. On 6 December 2008, a massive landslide occurred in Bukit Antarabangsa damaging 14 houses and a few lives were lost. The defendant's house was completely destroyed in the massive landslide. After the landslide, the defendant made a claim against the plaintiff under the policy and the plaintiff offered RM530,000 to the defendant. This offer contained a subrogation clause. The defendant accepted the plaintiff's offer and the sum of RM530,000 was paid by the plaintiff to the defendant. The defendant signed the receipt for the payment. Subsequently, the defendant and several other residents whose houses were damaged in the landslide filed a civil suit ('Suit 846'), against the developer of a nearby land and the local water authority claiming compensation for the damage to their houses. Pursuant to an out of court settlement, the defendant received a sum of RM1,297,000 in Suit 846, which included a sum of RM800,000 for the damage to the defendant's house. Hence, the plaintiff filed the instant suit pursuant to the subrogation clause in the receipt to claim back the sum of RM530,000 that was paid to the defendant under the policy. The defendant claimed that the total cost to rebuild his house was more than RM530,000. The defendant also pleaded that the subrogation clause did not cover his uninsured losses ie the sum of RM800,000 that he had received in Suit 846 for the damage to his house. According to the defendant, the total cost to rebuild his house exceeded RM1.6m. Hence, the defendant claimed that he was entitled to keep the said sum of RM530,000 that he had received from the plaintiff and also the sum of RM800,000 that he had received in Suit 846. The defendant further claimed that the plaintiff did not exercise its right to commence legal proceedings

and/or did not 'lend support' by way of costs in Suit 846. A

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff was entitled to recover the sum of RM530,000 from the defendant pursuant to the terms of the subrogation clause that the defendant had signed when he accepted the sum of RM530,000 from the plaintiff in full and final satisfaction of his claim against the plaintiff under the policy (see para 102). B

(2) The wording of the subrogation clause was clear and unambiguous. The effect of it was that the plaintiff had stepped into the shoes of the defendant who could not be allowed to make a double claim for the loss to his house and to sue a third party for the same loss for which he had been compensated or indemnified by the plaintiff (see para 113). C

(3) The plaintiff's right to commence legal proceedings in the name of the defendant for the damage to his house would have subsisted until 6 December 2014. However, the defendant had filed his writ of summons on 8 September 2010, and had included a claim for the loss of his house. It is trite law that only one suit can be filed for any claim for damages. With regard to costs, the defendant had already agreed to an out of court settlement of Suit 846 in May 2013 and hence, the question of the plaintiff contributing to any costs could not arise, as the defendant did not inform the plaintiff that he was filing such a suit before commencing proceedings in Suit 846 (see para 116). D E

(4) There was no evidence before the court to support the defendant's allegation that the house was worth RM1.4m after the extension and renovation works were carried out, as neither the valuer, who had allegedly prepared the valuation report, nor the contractor, who had allegedly carried out the extension and renovation works or any supplier of the materials, which were allegedly used for the extension and renovation works, was called as a witness to support his evidence during the trial. There was also no evidence to show that the plaintiff was informed that the alleged value of the property was in excess of that amount (see para 118(a) & (c)). F G

(5) Since the defendant had brought Suit 846 to claim for the damage to his house, he had made a double claim for the damage to his house and, therefore, he was bound to pay back the said sum of RM530,000 to the plaintiff (see para 123). H

I

[Bahasa Malaysia summary

Plaintif adalah syarikat insurans. Defendan telah membeli polisi insurans ('polisi tersebut') daripada BH Insurance (M) Bhd. Polisi tersebut berhasrat untuk memberi perlindungan kepada plaintif daripada kerosakan rumahnya di

Bukit Antarabangsa, Ampang, Selangor. Jumlah yang diinsuranskan adalah RM555,000. Berikutan itu, plaintif telah mengambil alih BH Insurance (M) Bhd dan defendan telah menjadi pemegang polisi plaintif. Pada 6 Disember 2008, tanah runtuh yang besar telah berlaku di Bukit Antarabangsa yang telah memusnahkan 14 rumah dan beberapa nyawa telah terkorban. Rumah defendan telah musnah sepenuhnya dalam tanah runtuh yang besar itu. Selepas tanah runtuh itu, defendan telah membuat tuntutan terhadap plaintif di bawah polisi tersebut dan plaintif menawarkan RM530,000 kepada defendan. Tawaran ini mengandungi suatu fasal subrogasi. Defendan telah menerima tawaran plaintif dan jumlah RM530,000 telah dibayar oleh plaintif kepada defendan. Defendan telah menandatangani resit untuk pembayaran. Berikutan itu, defendan dan beberapa penduduk lain yang rumah-rumah mereka musnah akibat tanah runtuh itu telah memfailkan guaman sivil ('Guaman 846'), terhadap pemaju tanah berdekatan dan pihak berkuasa air tempatan dengan menuntut pampasan untuk kerosakan kepada rumah-rumah mereka. Berikutan satu penyelesaian luar mahkamah, defendan telah menerima sejumlah RM1,297,000 dalam Guaman 846, yang mana termasuklah jumlah RM800,000 untuk ganti rugi kepada rumah defendan. Justeru, plaintif telah memfailkan guaman ini menurut fasal subrogasi dalam resit itu untuk menuntut balik jumlah RM530,000 yang telah dibayar kepada defendan di bawah polisi tersebut. Defendan telah mendakwa bahawa keseluruhan kos untuk membina semula rumahnya adalah melebihi RM530,000. Defendan juga mempli bahawa fasal subrogasi itu tidak meliputi kehilangannya yang tidak diinsuranskan iaitu sejumlah RM800,000 yang telah diterimanya dalam Guaman 846 untuk kerosakan kepada rumahnya. Menurut defendan, keseluruhan kos untuk membina semula rumahnya melebihi RM1.6 juta. Justeru, defendan mendakwa bahawa dia berhak untuk menyimpan sejumlah RM530,000 tersebut yang telah diterimanya daripada plaintif dan juga sejumlah RM800,000 yang telah diterimanya dalam Guaman 846. Defendan selanjutnya mendakwa bahawa plaintif tidak melaksanakan haknya untuk memulakan prosiding undang-undang dan/atau tidak 'lend support' melalui kos dalam Guaman 846.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif berhak untuk mendapat balik sejumlah RM530,000 daripada defendan menurut terma-terma fasal subrogasi yang telah ditandatangani oleh defendan apabila dia menerima sejumlah RM530,000 daripada plaintif untuk dengan kepuasan penuh dan muktamad tuntutannya terhadap plaintif di bawah polisi tersebut (lihat perenggan 102).

(2) Susunan kata fasal subrogasi adalah jelas dan tidak taksa. Kesannya adalah bahawa plaintif telah mengambil alih peranan defendan yang tidak boleh dibenarkan membuat tuntutan berganda untuk kehilangan rumahnya dan untuk menyaman pihak ketiga bagi kehilangan sama yang

mana dia telah diberi pampasan atau ditanggung rugi oleh plaintif (lihat perenggan 113).

(3) Hak plaintif untuk memulakan prosiding undang-undang atas nama defendan untuk kerosakan kepada rumahnya yang akan wujud sehingga 6 Disember 2014. Walau bagaimanapun, defendan telah memfailkan writ saman pada 8 September 2010, dan telah memasukkan tuntutan untuk kehilangan rumahnya. Ia adalah undang-undang tetap bahawa hanya satu guaman boleh difailkan untuk apa-apa tuntutan ganti rugi. Berhubung kos, defendan telahpun bersetuju dengan satu penyelesaian luar mahkamah untuk Guaman 846 pada Mei 2013 dan justeru, persoalan plaintif menyumbang kepada apa-apa kos tidak mungkin timbul, kerana defendan tidak memberitahu plaintif bahawa dia memfailkan guaman sedemikian sebelum bermulanya prosiding untuk Guaman 846 (lihat perenggan 116).

(4) Tiada keterangan di hadapan mahkamah untuk menyokong pengataan defendan bahawa rumah itu bernilai RM1.4 juta selepas kerja pengubahsuaian dan sambungan itu dijalankan, kerana bukan penilai, yang telah diaktakan menyediakan laporan penilaian, mahupun kontraktor, yang dikatakan menjalankan kerja-kerja pengubahsuaian dan sambungan atau mana-mana pembekal bahan, yang dikatakan telah digunakan untuk kerja-kerja pengubahsuaian dan sambungan, telah dipanggil sebagai saksi untuk menyokong keteranannya sepanjang perbicaraan itu. Juga tiada keterangan untuk menunjukkan bahawa plaintif telah diberitahu yang nilai hartanah yang dikatakan itu melebihi jumlah tersebut (lihat perenggan 118(a) & (c)).

(5) Oleh kerana defendan telah memulakan Guaman 846 untuk menuntut bagi kerosakan kepada rumahnya, dia telah membuat tuntutan berganda untuk kerosakan kepada rumahnya itu dan, oleh demikian, dia terikat untuk membayar balik jumlah RM530,000 tersebut kepada plaintif (lihat perenggan 123).]

Notes

For cases on subrogation in general, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 517–524.

Cases referred to

Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors [2008] NSWCA 243, CA (refd)

Castellain v Preston and others (1883) 11 QBD 380; [1881-85] All ER Rep 493, CA (refd)

Globe & Rutgers Fire Ins Co v Truedell [1927] 2 DLR 659, CA (refd)

Hobbs v Marlowe [1977] 2 All ER 241, CA (refd)

Insurance Commission of Western Australia v Kightly (2005) 225 ALR 380, SC (refd)
Johnston v Endeavour Energy [2015] NSWSC 1117, SC (refd)
Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam [1993] 2 MLJ 474, HC (refd)
National Fire Insurance Co v McLaren (1886) 12 OR 682 (refd)
Rylands and another v Fletcher [1861–73] All ER Rep 1, HL (refd)
Teo Kim Kien & Ors v Lai Sen & Anor [1980] 2 MLJ 125, FC (refd)

Legislation referred to

Financial Services Act 2013
Insurance Act 1996 (revoked by the Financial Services Act 2013)

Andrew Khoo (Khoo & Sidhu) for the plaintiff.
Stanislaus Vethanayagam (MS Vethanayagam & Assoc) for the defendant.

Su Geok Yiam J:

THE PLAINTIFF'S SUIT

[1] On 25 February 2014, the plaintiff filed this suit through its solicitors, Messrs Khoo & Sidhu, against the defendant vide a writ of summons dated 25 February 2014, encl (1), and a statement of claim dated 24 February 2014, encl (2), to claim for the repayment of a sum of RM530,000 ('the said sum of RM530,000').

[2] The said sum of RM530,000 was paid by the plaintiff to the defendant in full and final satisfaction of a claim for indemnity by the defendant for policy monies under an insurance policy.

[3] This suit is based on the breach by the defendant of a subrogation clause ('the subrogation clause') in an acceptance and discharge receipt, dated 2 January 2009, that was signed by the defendant for the payment of the said sum of RM530,000 ('the receipt').

PARTIES IN THE SUIT

[4] The plaintiff is an insurance company that was licensed under the Insurance Act 1996 (which was repealed by the Financial Services Act 2013) with a registered office at Ground Floor, Wisma Boustead, 71, Jalan Raja Chulan, 50200 Kuala Lumpur.

[5] The defendant is a Malaysian citizen with an address at No 1, Jalan Bukit Mewah 1, Bukit Antarabangsa, 68000 Ampang, Selangor Darul Ehsan.

BACKGROUND FACTS

[6] The background facts are either agreed in the statement of agreed facts, that was filed by the parties pursuant to case management directions and marked 'C' by court, or are not in dispute. These background facts are as follows.

[7] The defendant had purchased an insurance policy bearing the No 10DPPS0049960700 ('the policy') from BH Insurance (M) Bhd. The policy was intended to give protection to the plaintiff against damage to his house at No 1, Jalan Bukit Mewah 1, Bukit Antarabangsa, 68000 Ampang, Selangor Darul Ehsan. The sum insured is RM555,000.

[8] Subsequently, the plaintiff took over BH Insurance (M) Bhd vide a vesting order issued by the Kuala Lumpur High Court dated 26 October 2010 and the defendant became a policy holder of the plaintiff.

[9] On 6 December 2008, a massive landslide occurred along Jalan Bukit Antarabangsa, Taman Bukit Mewah, Bukit Antarabangsa, Selangor Darul Ehsan. It was estimated that 101,500 cubic metres of earth with falling debris caused the massive landslide. The massive landslide damaged 14 houses and a few lives were lost.

[10] The defendant's house was not only severely damaged but also completely destroyed in the massive landslide. The defendant also lost his wife, Dr Yogeswary d/o Narayanan, who was buried in the massive landslide.

[11] The defendant and his three children were injured but they were rescued.

[12] After the massive landslide, the defendant made a claim bearing No DP81000044 against the plaintiff under the policy. The plaintiff offered the said sum of RM530,000 to the defendant. This offer contained the subrogation clause. The defendant accepted the plaintiff's offer and the said sum of RM530,000 was paid by the plaintiff to the defendant and the defendant signed the receipt for the payment.

[13] Subsequently, the defendant joined a number of the other residents in the area, whose houses were either damaged or destroyed in the massive landslide, in filing a civil suit ie Kuala Lumpur High Court Civil Suit No S-22–846 of 2010 ('Suit 846'), against the developer of the land near the defendant's house, namely, Superview Development Sdn Bhd ('Superview') and the local water authority, namely, Syarikat Bekalan Air Selangor Sdn Bhd

('SYABAS') (the defendants in Suit 846), to claim for damages for the damage and/or loss that they (the defendant and the other residents, who are the plaintiffs in Suit 846) had suffered as a result of the massive landslide.

[14] Thereafter, the defendant reached an out of court settlement with Superview and SYABAS, whereby the defendant received payment of a sum of RM1,297,000, which included a sum of RM800,000 for the damage to the defendant's house.

[15] Hence, the plaintiff filed the instant suit pursuant to the subrogation clause in the receipt to claim back the said sum of RM530,000 that was paid to the defendant under the policy.

THE PLAINTIFF'S CLAIM

[16] In para 11 of the plaintiff's statement of claim, the plaintiff claims for the following reliefs against the defendant:

(a) Special damages of RM 530,000.00;

(b) Interest at a rate to be determined by this Honourable Court;

(c) Cost;

(d) Any other relief that this Honourable Court deems fit and appropriate.

THE DEFENDANT'S DEFENCE

[17] On 24 March 2014, the defendant entered his appearance by filing his memorandum of appearance dated 21 March 2014, encl (4), through his solicitors, Messrs MS Vethanayagam & Assoc.

[18] On 7 April 2104, the defendant filed his statement of defence dated 3 April 2014, encl (5), through his solicitors, Messrs MS Vethanayagam & Assoc.

[19] In his statement of defence, the defendant denied that he had breached the subrogation clause in the receipt.

[20] The defendant pleads that the total cost to rebuild his house is more than the said sum of RM530,000 that he had received from the plaintiff. The defendant also pleads that the subrogation clause does not cover his uninsured losses ie the sum of RM800,000 that he had received from the insurers of the defendants in Suit 846 for the damage to his house. This is because the total cost to rebuild his house that was completely destroyed by the massive landslide exceeds RM1.6m.

[21] Hence, the defendant pleads that he is entitled to keep the said sum of RM530,000 that he had received from the plaintiff and also the sum of RM800,000 that he had received from the insurers of the defendants in Suit 846.

[22] Therefore, the defendant prays that the court dismisses the plaintiff's suit and claim with cost.

THE PLAINTIFF'S REPLY TO THE DEFENDANT'S DEFENCE

[23] On 16 April 2014, the plaintiff filed its reply dated 14 April 2014, encl (6), to the defendant's defence, through its solicitors, Messrs Khoo & Sidhu.

[24] In its reply, the plaintiff avers, inter alia, that the defendant has not denied that he filed Suit 846 to recover compensation for the destruction of his house and that the sum of RM1,297,000 that he received as an out of court settlement for Suit 846 (includes the compensation) for the destruction of his house.

THE TRIAL

[25] The trial commenced on 16 July 2015.

[26] It was continued on 24 August 2015, 12 January 2016 and 19 January 2016.

[27] The trial concluded on 19 January 2016.

THE WITNESSES

[28] The parties called five witnesses altogether.

THE PLAINTIFF'S WITNESSES

[29] The plaintiff called two witnesses. They are Mdm Wo Yoke Fong, who testified as PW1, and Mr Aldrin Wong, who testified as PW2.

[30] PW1 is an employee of the plaintiff. She is the Vice President for Marine & Customer Service Team (CST) claims. She has personal knowledge of the plaintiff's claim because she is the person who had handled the plaintiff's file for this claim. In her examination-in-chief that was given in the form of a witness statement (P1), she said that the policy that was purchased by the defendant is a house owner's insurance policy. The policy covers damage to the

A defendant's house. The policy also covers damage and/or loss due to subsidence and landslip. PW1 identified pp 1–6/BB as a copy of the policy.

[31] After the defendant made the claim under the policy for the loss of his house in the massive landslide, the plaintiff appointed M/s Cunningham Lindsey Adjusters (M) Sdn Bhd as the loss adjuster for the claim. As a result of the investigations that were carried out by M/s Cunningham Lindsey Adjusters (M) Sdn Bhd, the plaintiff was advised by the former that the claim fell within the risks that were covered by the policy ie landslip, and that the sum insured ie RM555,000 is applicable.

[32] Since the policy was subject to a deductible item of RM25,000, the plaintiff offered the said sum of RM530,000 to the defendant. The defendant accepted the offer and he signed the receipt. She identified pp 15–16/BB as a copy of the receipt.

[33] Thereafter, the plaintiff did not hear from the defendant.

[34] Subsequently, it came to the plaintiff's knowledge that the defendant had instituted Suit 846 against Superview and SYABAS. PW1 identified pp 17–48/BB as a copy of the writ of summons and statement of claim that were filed in Suit 846 by the defendant (DW1). In Suit 846, the defendant (DW1) claimed a sum of RM1.3m for the loss of his house in the massive landslide.

[35] The defendant did not contact the plaintiff before he filed Suit 846. Subsequently, it came to the plaintiff's knowledge that the defendant had settled his claim for the loss of his house for a sum of RM800,000. Since, the defendant did not inform the plaintiff before he filed Suit 846 and since the defendant had claimed for the same loss in Suit 846 for which he had received the said sum of RM530,000 as payment for the same loss, the defendant was in breach of the terms of the payment of the said sum of RM530,000 and the plaintiff is entitled to seek a refund of the said sum of RM530,000 from the defendant. Nevertheless, the defendant has not repaid the said sum of RM530,000 to the plaintiff.

[36] PW1 also said that the plaintiff is not aware of any relationship between the plaintiff and a person by the name of James Woo. The plaintiff also does not have any agent or employee known as James Woo.

[37] PW1 further said that the defendant never informed the plaintiff that he had purchased the policy to cover damage/loss to the renovated part of his house.

[38] In cross-examination, PW1's evidence remained consistent with her evidence given in her examination-in-chief. In addition, she also said that neither she nor her staff handled the policy as the defendant had purchased it from BH Insurance (M) Bhd. PW1 also does not know the agent who had sold the policy to the defendant. The risks covered under the policy, including landslides, is RM555,000. After making provision for the deductible item, the full sum has been paid ie the said sum of RM530,000.

[39] She agreed with the suggestion of Mr Stanislaus Vethanayagam, the learned counsel for the defendant, that the policy covers the cost of the re-instatement of the defendant's house ie a bungalow. PW1 does not know that it will cost more than RM1m or about RM1.3m to rebuild the bungalow to its original condition. PW1 disagreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that RM555,000 is insufficient to rebuild the bungalow.

[40] The defendant had signed the subrogation clause before the cheque for the said sum of RM530,000 was prepared and handed over to the defendant.

[41] PW1 agreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the plaintiff as the insurer could sue any party to recover the said sum of RM530,000. PW1 disagreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the subrogation clause cannot restrict the defendant from suing Superview and SYABAS because there is a large uninsured sum.

[42] PW1 also said that subrogation applies against whoever is liable for the defendant's claim against the plaintiff but it does not apply against the insured. Since the defendant has obtained double indemnity by claiming and receiving payment against the plaintiff and also Superview and SYABAS in Suit 846 for the cost of rebuilding his house, the defendant has breached the subrogation clause and the defendant is liable to refund the said sum of RM530,000 to the plaintiff. PW1 disagreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the subrogation clause cannot restrict the defendant from suing Superview and SYABAS because the cost of rebuilding the house is more than the said sum of RM530,000 ie RM1.3m. PW1 disagreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the subrogation clause cannot restrict the defendant from suing Superview and SYABAS and obtaining the sum of RM800,000 because the defendant did not derive any profit from the two payments totalling RM1.3m since the cost of rebuilding his house is RM1.3m. PW1 disagreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the subrogation clause will only apply if there is an excess from the sum total of the two payments when compared to the cost

of rebuilding the house. PW1 explained that double insurance is not the same as double indemnity and that what has happened in this suit is the latter. Hence, the plaintiff is seeking the refund of the said sum from the defendant and not subrogation from the defendant because the plaintiff has paid the defendant's claim in full ie 100%, without obtaining any contribution from any other insurer. PW1 also said that the plaintiff's loss adjuster had informed the plaintiff that a sum of RM550,000 is sufficient to rebuild the plaintiff's house.

[43] On the issue concerning whether James Woo is an employee or agent of the plaintiff, PW1 said that she does not know James Woo. She said that although the plaintiff took over BH Insurance (M) Sdn Bhd, the plaintiff did not take over all the agencies. The plaintiff has its own agent, namely, Alfa Management, and James Woo is not an employee of Alfa Management.

[44] PW1 also said that if the defendant had purchased the policy in order to provide cover for the renovated part of his house against damage/loss, this fact would have been stated in the policy.

[45] In her re-examination, PW1 explained that if the plaintiff sues under the subrogation clause, the plaintiff will sue in the name of the defendant.

[46] PW1's evidence is corroborated by the evidence of PW2. PW2 is a loss adjuster and the Senior Vice President (Construction) in M/s Cunningham Lindsey Adjusters (M) Sdn Bhd. At the outset of his examination-in-chief, PW2 wished to use a witness statement as his examination-in-chief. However, the court did not grant him his wish because he had informed the court that the answers in his witness statement was provided by the lawyer. The court then directed him to give his evidence orally to the questions posed to him by Mr Andrew Ng, learned counsel for the plaintiff.

[47] In his examination-in-chief, PW2 testified that the plaintiff had appointed M/s Cunningham Lindsey Adjusters (M) Sdn Bhd to carry out the investigation and loss adjustment for the claim by the defendant for the loss of his house after the massive landslide. PW2 was the adjuster who was in charge of the defendant's claim.

[48] PW2 testified that the defendant received the said sum of RM530,000 after deducting a sum of RM25,000 as the deductible item. He identified p 15 of Bundle B as the subrogation clause in the acceptance and discharge receipt dated 2 January 2009. He also identified pp 49–50 of Bundle B as the two letters (P2 and P3, respectively) that he had written to the defendant to remind him of the subrogation clause whereby the defendant's claim against a third

party or parties has been subrogated. He informed the court that he had written both the letters to the defendant on the instructions of Miss Ang Puay Yoke and Puan Siti Zuraidah of the plaintiff.

[49] In cross-examination, PW2's testimony was consistent with his testimony in examination-in-chief. PW2 testified that on 9 December 2008, he went to the site where the defendant's house was located to carry out his survey of the damage to the defendant's house. He also testified that the defendant's house was very severely damaged and that it had to be rebuilt. Subsequently, after the plaintiff had paid the defendant the said sum of RM530,000, he was informed by SYABAS that a sum of RM800,000 was paid to the defendant by SYABAS for the damage to the defendant's house.

[50] On the amount of the cost for the reconstruction of the defendant's house, PW2 testified that he had made comparisons with other like houses and he was of the opinion that the said sum of RM530,000 is sufficient to cover the cost of the reconstruction of the house based on the built up area of the house ie 3,000 sqft or about 300 sqmt. He was of the opinion that the cost of construction of the building proper is RM250 per square foot. As for the porch and the terraces which totaled 514 sqft, he was of the opinion that the cost of reconstruction is RM50 per square foot because a lesser amount of construction is required.

[51] PW2 agreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the defendant's house was extensively renovated. However, he testified that the cover that was purchased by the defendant did not cover kitchen cabinets and the furniture including the sofa and the television set.

[52] PW2 agreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the plaintiff did not sue any third party in order to recover back the said sum of RM530,000 that was paid to the defendant by the plaintiff. PW2 also agreed with the suggestion of Mr Stanislaus Vethanayagam, learned counsel for the defendant, that the word or term 'subrogation' is nowhere to be found in the terms and conditions of the policy as set out at p 20 of Bundle M.

[53] In re-examination, PW2 clarified that he had addressed his two letters to C&S Engineering Management because the defendant was working in that company.

[54] PW2 also clarified that he was not given the full report of the cost for the reconstruction of the defendant's house starting from pp 66/BB–77/BB or the

receipts for payments, allegedly, made by the defendant to the contractor and the various suppliers of the items as started therein at pp 81–134/BB.

[55] PW2 also clarified that the said sum of RM530,000, that was paid to the insured was restricted by the sum insured less the policy excess and that it, was insufficient to put back the house into its original condition. This is because based on his calculations, the cost of reconstructing the defendant's house exceeded the sum insured in the policy.

[56] PW2 also testified as follows:

KKT: Ok. Now question to you from my learned friend was were you subsequently aware that a group of house owners were pursuing a legal action against a number of Defendants? And you said yes. Did this group of house owners include the Plaintiff? I mean, the Defendant. The Defendant, was he part of the group of house owners who were pursuing a legal action against the Defendant?

ALDRIN: Yes, My Lady.

KKT: He was?

ALDRIN: I believe so, My Lady.

KKT: Leading on from that, when you were subsequently aware that they were pursuing a legal action, were you aware whether the writ had already been filed or not? When you say pursuing, you were asked this question, were you subsequently aware a group of house owners were pursuing legal action. So when you were made aware of this, had the writ been filed by them against the series of Defendants?

ALDRIN: I believe so, My Lady.

KKT: Mr Aldrin, you were asked question just now, just before my learned friend stopped, that are you aware that there was an agent who was instrumental in going to the site and all? And you said no. And then, the question then was it was only after that the insurer was informed of a problem that the insurers contacted you. And you said yes. So when you were contacted by the insurer, what were the instructions? What instructions were given to you? What did the insurers tell you to do?

ALDRIN: My Lady, the insurer told me to survey the loss.

KKT: Loss of what?

ALDRIN: Loss of damaged buildings.

KKT: Which —

ALDRIN: That was caused by a landslide.

KKT: Caused by the landslide. So those were the instructions you received? A

ALDRIN: That's right.

THE DEFENDANT'S WITNESSES B

[57] The defendant called three witnesses. They are K Thanarajah a/l Kanagaratnam, the defendant himself, as DW1; Mr T Kasinathan @ Sunther, an advocate and solicitor, as DW2; and James Woo Chee Ngai, the insurance agent, who the defendant (DW1) alleged was working for the plaintiff at the material time and who the defendant also alleged had advised him to purchase the policy to cover the cost of renovation and extension to his house, as DW3. C

[58] DW1's examination-in-chief was conducted in the form of a witness statement (D5) and a supplementary witness statement (D6) that was prepared and filed in answer to additional questions posed to him by Mr Stanislaus Vethanayagam, his learned counsel. In examination-in-chief, DW1 said, inter alia, as follows. D

[59] He is a civil engineer. Due to the massive landslide, which affected 14 houses in Bukit Antarabangsa on 6 December 2008, in which his wife, Dr Yogeswary d/o Narayanan died instantly and he and his three childred were injured, his house was completely damaged beyond repair. E

[60] A few months prior to the massive landslide, he had spent a sum in excess of RM400,000 to renovate his house and he was advised by an insurance agent, who was working for the plaintiff, by the name of James Woo, to purchase further insurance for the amount of RM550,000 from the plaintiff for which he had paid a premium of RM2,220.87. F

[61] He admitted that after he had made a claim on the policy, the plaintiff paid him the said sum of RM530,000 after making a deduction of RM25,000 for a deductible item. G

[62] He also admitted that sometime in early January 2009, he signed a few documents together with a discharge voucher and confirmation of receiving payment when the insurers paid out the said sum of RM530,000 to him. H

[63] However, he alleged that at that time, he did not fully understand the terms in the documents. Neither was the subrogation clause explained to him nor was it sent to him earlier for his consideration. I

[64] He also alleged as follows.

[65] He had signed the documents because he was under the impression that the 'Subrogation clause' was a standard clause, which was normally imposed by the insurers on the insured, when they pay out a claim.

[66] The policy was an additional policy that was secured by him for protection of the renovations and/or improvements that were done to his house. DW1 identified pp 66–77/BB as a copy of the valuation report that was done for the renovations and extensions to his house.

[67] DW1 could not produce all the receipts and invoices for the renovations and improvements to his house because a lot of the payment vouchers and receipts for labour and materials supplied, and the other incidental works that were kept in his house were all destroyed in the massive landslide.

[68] DW1 also said, inter alia, as follows:

(1) he started to rebuild his house only in 2014 after the government had completed slope strengthening works and issued a certificate that the land was safe for occupation;

(2) the estimated cost of construction of his house is RM1.5m but the cost has exceeded RM1.5m and the construction of this house is still not completed;

(3) Suit 846 was initiated on his behalf against Superview and SYABAS (the defendants in Suit 846) by one of the neighbours, who was a practicing lawyer, and who was approached by all the affected parties who had asked him to do so; and

(4) the claim by the 15 plaintiffs in Suit 846 was based on occupier's liability and nuisance as per the rule in *Rylands v Fletcher*;

(5) he had agreed to the out of court settlement in the region of RM1.27m of which only RM800,000 was to be paid towards the cost of the reconstruction of the house;

(6) the solicitor on record who had worked tirelessly to achieve the out of court settlement has agreed to give evidence in this trial;

(7) when the trial commenced, the shareholders of Superview and the insurers for SYABAS offered an amount of RM16m to be shared among the 14 house owners;

(8) a decision was taken whether it is desirable to continue the protracted law suit or to take up the offer;

(9) he decided in the circumstances to take up the offer rather than to continue the law suit because even if liability is secured the chances were too remote to get any monies out of the first defendant who was only a RM2 paid up company;

(10) he gave the following breakdown of the amount of RM1.27m, which he had accepted from the insurers of the second defendant in Suit 846:

No	Items	Amount in RM
1	Replacement cost of the house	800,000
2	Replacement cost of the Household Belongings	50,000
3	Amount of rental for 2 years @ RM2,000 pm	48,000
4	Soil testing	8,000
5	Dependency claim in respect of Dr Yogeswary	240,000
6	Other costs	124,000

(11) the said amount of RM530,000 ought not to be returned to the plaintiff because the additional insurance that was secured from the plaintiff under the policy was for the extension and renovation works that were done to his house;

(12) the sum of RM800,000 that he had received from the out of court settlement is barely sufficient to cover the cost for the reconstruction of his house back to its original position; and

(13) the cost of reconstructing his house to its original position is actually an uninsured loss that does not come within the subrogation clause.

[69] In his supplementary examination-in-chief as per his supplementary witness statement (D6), DW1 said that the total built up area of his house is 328.75 sqmt before the extension and renovation works were carried out and approximately 400 sqmt after the extension and renovation works were carried out. DW1 also said that after the extension and renovation works were carried out, he had taken out the additional insurance cover for his house as he was advised by the plaintiff's insurance agent (DW3) that his house was underinsured.

[70] Therefore, based on his evidence as set out above, DW1 prays that the court dismisses the plaintiff's suit and claim with cost as he did not make any windfall out of the misfortune that had incurred to him and his family.

[71] In cross-examination, DW1 said, inter alia, that the replacement cost of the house is the cost for the reconstruction of the house. He disagreed with the suggestion of Mr Andrew Khoo, learned counsel for the plaintiff, that he (DW1) had to return the said sum of RM530,000 to the plaintiff.

[72] On the issue whether James Woo was the plaintiff's agent or the defendant's agent, DW1 agreed with the suggestion of Mr Andrew Khoo, learned counsel for the plaintiff, that James Woo was the defendant's agent because James Woo was looking after his interest at the material time.

[73] In re-examination, DW1 clarified that he has known James Woo for the last 25 years and that James Woo has taken care of the defendant's (DW1's) insurance matters for the last 17 years. He also reiterated that James Woo is an employee of Alpha Management, an insurance broker and that at the time, he (DW1) signed the receipt at p 15/BB, he (DW1) was in his mother's home and his hand and his leg were fractured. He also added that he did not understand what 'subrogation' at p 15 meant at the time he signed the receipt.

[74] In examination-in-chief, Mr T Kasinathan @ Sunther (DW2), a practicing lawyer since 1991, testified, inter alia, as follow.

[75] A copy of the list of questions, encl (44), (that was directed to be filed and served by the defendant on the plaintiff and DW2 by the court during case management proceedings) marked 'L' by the court for use in the trial, was shown to him and the court asked him whether he had received it. He informed the court that it was not served on him.

[76] DW2 explained that Mr Stanislaus Vethanayagam, learned counsel for the defendant, had approached him a day earlier and had showed him a list questions but he did not give him (DW2) a copy of the list of questions.

[77] Since, DW2 had to attend to another meeting first, he only went through the list of questions after the meeting. DW2 filed a total of 15 actions for 15 individuals for strict liability, negligence and breach of statutory duty against the first defendant, Superview, which is a dormant company, and the second defendant, SYABAS, which was insured with Tika Insurance for a sum of RM7m.

[78] One of the 15 actions that he had filed on behalf of the 15 plaintiffs was for a dependency claim as one person had passed away in the massive landslide. That person was the defendant's late wife.

[79] Altogether 14 houses were destroyed including the defendant's house.

[80] Each of the 14 houses was built on a piece of land, 2,600 sqft in area.

[81] The quantity surveyor ('QS') did a valuation report for the replacement cost of the basic house that was built on the land. The QS arrived at a sum of

RM840,000. The QS also stated a sum of RM50,000 as the replacement cost of the contents of the defendant's house and a sum of RM2,000 as the monthly rental for a two years period.

[82] The defendant received a sum of RM1.1m.

[83] The defendant also received a sum of RM240,000 for the death of his wife in the dependency claim filed by the defendant.

[84] The defendant (DW1) was paid a sum of RM750,000 as the cost of the replacement of his house.

[85] DW2 was not re-examined by Mr Stanislaus Vethanayagam, learned counsel for the defendant.

[86] In his examination-in-chief, James Woo Chee Ngai (DW3) testified, inter alia, as follows.

[87] He is a life insurance agent with Prudential Assurance Bhd. On Friday, which was a day before he attended court to give his evidence in the trial of the instant suit, he was informed by Mr Stanislaus Vethanayagam, learned counsel for the defendant, that he (DW3) had to attend court as a witness.

[88] A copy of the list of questions, encl (45), was shown to DW3 in court but he has neither seen encl (45) before nor was a copy of it served on him by Mr Stanislaus Vethanayagam before he (DW3) attended court that day.

[89] A copy of the subpoena, encl (53), was also shown to DW3 in court but DW3 was not served with a copy of the subpoena.

[90] He had attended court because the defendant and the defendant's lawyer had called him to inform him to attend court as a witness for the instant suit.

[91] In cross-examination, DW3 testified that in the years 2007 and 2008, he was not an agent for BH Insurance Bhd. He had referred the defendant's (DW1's) request to Alpha Management.

[92] In re-examination, he clarified that Alpha Management is Alpha Management Services ('AM Services'), that AM Services is an insurance agency and that in the year 2005 or the year 2006, he (DW3) started referring business to AM Services. Thereafter, the defendant purchased his insurance policy from AM Services.

THE DEFENDANT'S SUBMISSIONS

[93] Mr Stanislaus Vethanayagam submitted that the plaintiff's suit and claim ought to be dismissed with cost for the following reasons:

(a) there was no evidence at the trial that full payment of the said sum of RM530,000 was paid to the defendant in order to trigger off the subrogation clause both in law and in equity;

(b) the plaintiff did not exercise its right to commence any legal suit under the insured's name pursuant to their own subrogation clause;

(c) the plaintiff did not lend support to the defendant by way of cost in the defendant's claim in Suit 846 for reinstatement of his property;

(d) the plaintiffs' indemnity under the policy was grossly insufficient to reinstate the property because there was a large sum (approximately RM800,000), which remained uninsured;

(e) subrogation does not apply to an uninsured amount to reinstate the property of an insured;

(f) there was evidence viz PW3's evidence, that the defendants in Suit 846 were not in a position to pay if liability was determined by the court against them after a full trial, and taking into account a protracted trial an 'ex-gratia payment' was accepted by the plaintiffs in that suit (including the defendant in the instant case) to elevate the immediate needs of all the affected families;

(g) the plaintiff's insurer cannot commence proceedings against the defendant (insured) because so far as any right of subrogation is concerned, the rule is that an insurer may not exercise subrogation rights against its own assured;

(h) no one pays a premium to purchase insurance cover only to have the insurer turn around and seek to recover the payment of the loss. If the person assured is the person who caused the damage, it is impossible to see how the right can be asserted at all. In principle, insurance extends also to loss caused by the negligence of the assured;

(i) he would lose that cover if the insurer could take back with subrogation what he had given with the insurance. The rule also prevents the possibility that the insurer will use information gained from its assured in support of its subrogation claim;

(j) the general rule that an insurer cannot exercise subrogation rights against its own assured makes perfect sense when the potential target is the party that paid the premium (see *Subrogation (Principles and Practice)* by Paul Handy — Crawford & Co and Brendan Mc Carthy — Beachcroft LLP);

(k) subrogation is a doctrine founded on indemnity but the defendant did not make a windfall of the total sum received viz the said sum of RM530,000 plus the RM800,000, which is an 'ex-gratia payment', from SYABAS, a third party. The claim initiated by the defendant against Superview and SYABAS, was for RM1.3m for reinstatement of the subject property in Suit 846 not including the content, household belongings, loss of rental and other expenses;

(l) the defendant's stand on this is consistent with contemporary documents at p 34 Bundle B and at pp 69–72 of the valuation report of M/s Raine & Horn, which remains unrebutted;

(m) further DW1 also gave evidence that he spent in excess of RM1.4m and he produced receipts at pp 81–193 of Bundle B;

(n) DW1 also gave evidence that he could not produce other receipts for the renovation since these were destroyed by the landslide;

(o) the defendant did not in any way make a windfall out of his misfortune;

(p) the total amount of insurance monies which he received from the plaintiff and the third party did not fully indemnify the cost of reinstatement of his property;

(q) in these circumstances, there is nothing to pay back. The plaintiff's claim is therefore misconceived and untenable. The plaintiff has not proven its case to justify its claim;

(r) in Canada, it has been accepted for a long time that an enforceable right of subrogation does not arise until the insured has been fully indemnified for his loss (see *National Fire Insurance Co v McLaren* (1886) 12 OR 682);

(s) similarly, the statement by Brett LJ in *Castellain v Preston and others* (1883) 11 QBD 380 at p 389; [1881–85] All ER Rep 493, that an insurer 'cannot be subrogated into a right of action until he has paid the sum insured and made good the loss', would seem to indicate that His Lordship thought that a full indemnity for the insured's loss is required before the insurer can enforce its right of subrogation;

(t) the defendant's second witness (DW2) gave evidence on the issue of 'ex-gratia payment' which was accepted by the plaintiff's learned counsel without any cross-examination;

(u) in commencing Suit 846, the defendant acted in good faith and on reasonable grounds in order to indemnify the cost of reinstatement of his house. The plaintiff did not prove that the defendant made a profit out of his misfortune;

(v) the plaintiff paid an amount that was insufficient to reinstate the subject property;

(w) therefore, the plaintiff has no right in subrogation or in any other principle of insurance law to claim for an uninsured amount not covered by the policy (see *Subrogation (Principles and Practice)* by Paul Handy — Crawford & Co and Brendan Mc Carthy — Beachcroft LLP, where the learned author writes as follows:

> Subrogation is the rights of insurers, once they have paid the insurance money due, to exercise any rights or remedies of the insured arising out of the insured event to recover their outlay from a culpable third party ...
>
> ...
>
> The first is that subrogation is a doctrine founded on the indemnity principle, namely that *an insured has a right to be indemnified against his loss but cannot make a profit from it by getting paid his insurance money as well as obtaining compensation from a third party*.
>
> ...
>
> In the absence of a specific term or agreement to that effect, if the insured has suffered a loss over and above the amount for which they have been indemnified, the insured is entitled to control the proceedings and can settle the claim without reference to the insurer. However, the insured must still act in good faith, which means including both insured and uninsured losses and not compromising any claim insurers may have when negotiating a settlement. Should the insurer's claim be prejudiced, the insurer would be able to seek reimbursement from the insured.
>
> ...
>
> The Courts in such cases such as *Buckland v Palmer* [1984] 1 WLR 1109 and *Hayler v Chapman* [1989] 1 Lloyds Rep 490 (where, unbeknownst to insurers, the policyholders had sued for their uninsured losses) have refused later attempts by insurers to set aside the judgment or overturn the settlement so that they could bring a subrogated claim for the insured losses.
>
> That said, and provided of course the Defendant is willing to agree, there is nothing to prevent settlement of the insured element of any claim, but care must be taken in drafting the settlement agreement so as to ensure that the uninsured loss claim is preserved and there can be no argument that it is in full and final settlement of all causes of action by the insured against the third party.

(x) an issue arose viz whether the said property can be reinstated to its original position at a cost of RM530,000 and PW3 said that it could not be done because the cost of reinstatement exceeded that amount based on the valuation report of M/s Raine & Horn;

(y) in *Insurance Commission of Western Australia v Kightly* (2005) 225 ALR

380, Steytler P, Wheeler and Roberts-Smith JJA stated as follows: A

> *an ex gratia payment made in mere anticipation of a possible finding of liability, which has not yet occurred, does not support a right of subrogation on the basis of a claim for money had and received by the insured to the use of the insurer …*;

(z) there is evidence (PW3's) that in the insured's suit against the third parties, he received only RM800,000 as the reinstatement cost of the original house while his claim was for RM1.3m plus (+) a claim of RM115,000 for loss of personal contents (RM50,000 was paid by the insurers) and a claim for house hold items of RM300,000; B

(aa) further, PW3 also gave evidence that the defendants in Suit 846 viz the first defendant, Superview, who was a RM2 paid up company, had no ability to pay and it was its parent company, which decided to contribute towards the out of court settlement, together with the second defendant; C

(ab) the amount available for distribution was in the region of RM16m for 14 families. Since all the claimants had different figures for the cost of reinstatement, it was agreed that they pay RM800,000 across the board to each of them; D

(ac) in *Johnston v Endeavour Energy* [2015] NSWSC 1117 (unreported judgments NSW), Garling J clearly stated that the authors draw attention to the position in Canada. The authors refer to a judgment of Ferguson JA in the Appeal Division of the Ontario Supreme Court in *Globe & Rutgers Fire Ins Co v Truedell* [1927] 2 DLR 659, where the learned judge identified a number of propositions at pp 668–670 including the following propositions: E F

> *That in cases where the loss of the insured exceeds the amount of the insurance monies he has received, the insurers are not subrogated to the full rights of the assured so as to enable them or the Courts to interfere with or control the assured in the prosecution or settlement of his claim against third parties, except to require him in prosecuting or in settling his claims against such third parties to act with diligence and in good faith, having regard to the fact that the insurers are interested.* G

(ad) further, in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors* [2008] NSWCA 243, Allsop P (with whom Beazley and Campbell JJA agreed), referred at pp [306]–[308] to the Canadian line of authority, and suggested that it was consistent with the preferred view in England. Allsop P also identified the view expressed in a number of textbooks that: H

> … until the insured has been fully indemnified for his total loss he remains entitled to control the litigation as *dominus litis*. I

(ae) the learned judge in that case having found that it was unnecessary to resolve the issue, went on to say as follows at p [308]:

> What is revealed ... by this discussion (whoever is entitled to start and control litigation, and in what order the funds should be distributed) is the entitlement or interest of the insured in the proceeding with a claim concerning which rights of subrogation exist until its loss is the subject of full indemnification or reparation.

THE PLAINTIFF'S SUBMISSIONS

[94] Mr Andrew Khoo, learned counsel for the plaintiff, submitted that the plaintiff's suit and claim ought to be allowed with cost based on the reasons and authorities, which were agreed and accepted by the court and which have been adopted herein.

DECISION OF THE COURT

[95] On 4 April 2016, after having considered the submissions of and the authorities cited by Mr Andrew Khoo, learned counsel for the plaintiff, and Mr Stanislaus Vethanayagam, learned counsel for the defendant, the court was satisfied that the plaintiff has proven its suit and claim against the defendant on a balance of probabilities based on the evidence adduced by the parties before the court and the principles of law which are applicable.

[96] Consequently, the court granted judgment in favor of the plaintiff against the defendant for the said sum of RM530,000 as special damages together with interest thereon at the rate of 5%pa for the period from the date the defendant received the payment of the sum of RM800,000 from Superview and SYABAS and a sum of RM25,000 as the cost of the action.

[97] Being dissatisfied with the decision of the court, the defendant has filed a notice of appeal to the Court of Appeal against the decision of the court.

ISSUES FOR THE DETERMINATION OF THE COURT

[98] The parties have framed the following three issues for the determination of the court:

(1) whether the defendant had obtained insurance cover upon the advice of the plaintiff?

(2) whether the sum of RM800,000 that forms a part of the consent judgment for Suit 846 is for the damage to the defendant's house? and

(3) whether the defendant is liable to repay to the plaintiff the said sum of RM530,000?

REASONS FOR THE DECISION OF THE COURT

[99] Below are the reasons why the court gave judgment in favour of the plaintiff together with interest thereon and cost.

Issue (1): Whether the defendant had obtained insurance cover upon the advice of the plaintiff?

[100] Based on the evidence before the court, the court found that the plaintiff had failed to prove on a balance of probabilities that the defendant had obtained insurance cover upon the advice of the plaintiff. This is because the evidence of DW1 was not supported by the evidence of DW3 as DW3 had testified that he was not an agent for BH Insurance Bhd and that DW3 had referred DW1 to AM Services, when DW3 approached him to inquire about the purchase of an insurance policy for his house.

Issue (2): Whether the sum of RM800,000 that forms a part of the consent judgment for Suit 846 is for the damage to the defendant's house?

[101] Based on the evidence before the court, the court the sum of RM800,000 that forms a part of the consent judgment for Suit 846 is for the damage to the defendant's house because the defendant's witness (DW2) had testified to this effect. Furthermore, DW1 had admitted this in his statement of defence and also in his evidence during the trial.

Issue (3): Whether the defendant is liable to repay to the plaintiff the said sum of RM530,000?

[102] Based on the evidence and the doctrine of subrogation that is applicable to the facts of the instant case, the plaintiff is entitled to recover the said sum of RM530,000 from the defendant pursuant to the terms of the subrogation clause that DW1 had signed when he accepted the said sum of RM530,000 from the plaintiff in full and final satisfaction of his claim against the plaintiff under the policy.

Additional issue (1): Whether the said sum of RM530,000 was in fact paid by the plaintiff to and received by the defendant?

[103] The court answered this issue in the affirmative because of the following reasons.

[104] Confirmation of the payment and receipt by the defendant of the said sum of RM530,000 is contained in the following documentary and oral evidence:

(a) the cheque at p 14 of Part A of the common agreed bundle of documents ('BB');

(b) the contents of the receipt, at p 15/BB;

(c) the cheque requisition form at p 16/BB;

(d) the answers to Questions 5 and 6 of the defendant's own witness statement ('D5'); and

(e) the oral evidence of the defendant's third witness, Mr James Woo (DW3), confirming that the said sum of RM530,000 was paid to the defendant.

[105] In the circumstances, the court rejected the submission of the defendant's learned counsel to the contrary on this issue.

Additional issue (2): What is the doctrine of subrogation and how does it operate?

[106] In the *Journal of Malaysian and Comparative Law*, the learned author writes as follows on subrogation:

> Through the principle of subrogation, the insurer has the ability to take over the rights of the assured against a third party who has caused the assured to suffer an insured loss and to bring proceedings in the assured's name. In insurance law, the function of subrogation is twofold. The first is to preserve the principle of indemnity. *The object of indemnity under insurance contracts is generally to restore the fortunes of the insured as if the insured loss had not occurred. The insurance indemnity is restricted to loss which is effectively an inevitable result of the peril insured.* The law of subrogation enables the insurer to recover from his assured the extent that he has been over-indemnified by the wrong doer or other party. The second function is to allow the insurer, once he has compensated the assured for the damage or loss covered, to exercise any rights that the assured has against the third party wrongdoer. (Emphasis added).

[107] In *Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125 (FC), Chang Min Tat FJ made the following observation on the doctrine of subrogation:

> This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrong-doer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own ...

[108] In *Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam* [1993] 2 MLJ 474 (HC) at p 475, the learned judge held as follows under 'Held 3':

(3) The doctrine of subrogation applies where an insured brings an action against the wrongdoer if called upon to do so by the insurer; but it is his own cause of action and not of the insurer. As against the wrongdoer, the insurer has no cause of action of his own. The insurer is therefore entitled to enforce the right of action against the wrongdoer in the name of the insured. Even in the absence of a formal assignment, if there was evidence that the insurance company concerned had paid under the insurance policy, it was entitled to the benefit of all rights possessed by the insured.

[109] In *Halsbury's Laws of Malaysia* (Vol 4), the learned author writes as follows on 'Insurance Law — Subrogation In Insurance' at p 57:

[60.048] Settlement of insured's claim by the insurer. The right of subrogation does not arise unless the insurer has indemnified the insured. The underwriter must first satisfy all the claims under the policy in respect of the particular subject matter.

[110] The general principle of subrogation is clearly explained in *Halsbury's Laws of England* (3rd Ed, Vol 22), as follows:

309. General principle of subrogation.

Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss (h). Subject to the foregoing, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss in so far as the assured has been indemnified by the insurer for the loss (i).

[111] This doctrine was further elaborated in the case of *Castellain v Preston and others* (1883) 11 QBD 380; [1881–85] All ER Rep 493 at p 496, where Brett LJ of the English Court of Appeal stated as follows:

In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.

[112] Reverting back to the instant case, the subrogation clause states as follows:

BH Insurance (M) Bhd
Wisma Boustead
71, Jalan Raja Chulan,
50200 Kuala Lumpur

Your ref: DP081000044
Adjuster's ref: CDP081097FDO

02nd January 2009

Attn: Mr. Allen Yun

Dear Sir,

SUBROGATION, ACCEPTANCE & DISCHARGE RECEIPT

INSURER'S REF. NO. DP08100044

I, K. THANARAJAH A/L A. KANAGARATNAM, whereby agree to accept from BH INSURANCE (M) BHD the sum of RM 475,233.40 (RINGGIT MALAYSIA FOUR HUNDRED SEVENTY FIVE THOUSAND TWO HUNDRED THIRTY THREE AND CENTS FORTY ONLY) which represents the indemnity adjustment (after taking into deduction for depreciation due to wear and tear). Upon reinstatement of the insured property, the balance amount of **RM 54,766.60 (RINGGIT MALAYSIA FIFTY FOUR THOUSAND SEVEN HUNDRED SIXTY SIX AND CENTS SIXTY ONLY)** shall be paid. These combined amounts once paid shall be deemed to be in full satisfaction and discharge of all claims present or future against the company in respect of damage to the insured building which was caused by landslide occurred at No. 1, Jalan Mewah 1, Taman Bukit Mewah, Bukit Antarabangsa, 68000 Ampang on 06th December 2008 under Policy No. **10DPPS0049960700.**

We placed on record that by virtue of such payment, the Underwriters concerned became subrogated to all our rights and remedies in and in respect of the subject matter insured in accordance with the laws governing the Contract of Insurance.

We also recorded that they have authority to use our name to the extent effectively to exercise all or any such rights and remedies that we will furnish them with any assistance they may reasonably require us when exercising such rights and remedies whilst in their part, they will indemnify us against liability for costs, charges and expenses arising in connection with any proceedings which they may take in our name in the exercise of such rights and remedies.

Date this day of 2009

...(signed)...
Ir. K. THANARAJAH
68/2/7-10-56/9

[113] Therefore, the court found that the wording of the subrogation clause in the instant case is clear and unambiguous. The effect of it is that the plaintiff has stepped into the shoes of the defendant who cannot be allowed to make a

double claim for the loss to his house and to sue a third party for the same loss for which he has been compensated or indemnified by the plaintiff.

Additional issue (3): Whether the defendant's claim against Superview, the developer, and SYABAS was for damage to his house?

[114] The court found that based on the documentary and oral evidence before the court, it is not in dispute that the defendant and the other owners of the damaged properties in Bukit Antarabangsa, had initiated proceedings against Superview, the developer, and also SYABAS for, inter alia, the loss of his house. A copy of the writ filed by the defendant for Suit 846 is at pp 17–48/BB. The claim for the loss of the entire property, including the defendant's house was RM1.3m.

[115] It is further not in dispute that the defendant was paid a sum of RM800,000 for the loss of his house as part of the out of court settlement for his claim in that writ (see para 9 of the statement of agreed facts ('C')).

[116] In their submissions, the solicitors for the defendant have contended that the plaintiff did not exercise its right to commence legal proceedings and/or did not 'lend support' by way of costs:

(a) with regard to the first of these two contentions, the court found that the plaintiff's right to commence legal proceedings in the name of the defendant for the damage to his house would have subsisted until 6 December 2014. However, the defendant had filed his writ of summons on 8 September 2010, and had included a claim for the loss of his house. It is trite law that only one suit can be filed for any claim for damages; and

(b) with regard to the second contention, the court found that the defendant had already agreed to an out of court settlement of Suit 846 in May 2013 (see the letter from M/s Cunningham Lindsey to the defendant dated 30 May 2013), and, hence, the question of the plaintiff contributing to any costs cannot arise, as the defendant did not inform the plaintiff that he was filing such a suit before commencing proceedings in Suit 846.

Additional issue (4): Whether the plaintiff has the right to seek recovery of the said sum of RM530,000 from the defendant?

[117] The court found that this issue ought to be decided in the affirmative in favour of the plaintiff based on the following reasons.

[118] The defendant has contended that the said sum of RM530,000 paid by the plaintiff to the defendant under the policy was insufficient to reinstate his house (see para 3 at pp 8–14 of the defendant's solicitors' submission):

(a) with respect to the solicitors for the defendant, it is clear on the face of the plaintiff's policy that the defendant had insured his house/building for a sum of RM555,000 (see p 3/BB) and the said sum of RM530,000 was paid to the defendant after a deduction of the excess/policy deductible of RM25,000. However, there is no evidence before the court to support the defendant's allegation that the house was worth RM1.4m after the extension and renovation works were carried out, as neither the valuer, who had allegedly prepared the valuation report, nor the contractor, who had allegedly carried out the extension and renovation works or any supplier of the materials, which were allegedly used for the extension and renovation works, was called as a witness to support his evidence during the trial;

(b) the contents of the available contractual documents viz the policy and the receipt, do not contain any reference to the value of the defendant's house/building exceeding a sum of RM555,000;

(c) there is also no evidence to show that the plaintiff was informed that the alleged value of the property was in excess of that amount; and

(d) in any event, any reference to the value in the valuation report of M/s Raine & Horne, which is not admissible in evidence as the maker was not called to testify, is for the value of the property, and takes into account the value of the land on and area in which it is situated and not of the actual house only.

[119] In the circumstances, the court found that there is no evidence to support the defendant's contention of 'uninsured' sums, or any 'ex-gratia' settlement.

[120] The case of *Castellain v Preston and others*, is clear authority for the right of a plaintiff to recover insurance monies paid to a defendant under a subrogation clause agreed to and signed by the defendant.

[121] In *Hobbs v Marlowe* [1977] 2 All ER 241, the plaintiff's insurers ('United Standard') paid him a sum of £227.59 as the cost of repairs under the policy. The plaintiff brought an action against the defendant for his uninsured losses (£73.53) and also the cost of repairs.

[122] Although the House of Lords held that the plaintiff was entitled to bring the action, it also held that the plaintiff would have been bound to pay back his insurers for the amount for repairs. At p 251d, Viscount Dilhorne

stated as follows:

> That Mr Hobbs would, if he recovered the sum of £227.59 in addition to his claim for £73.53, have been bound to pay that sum to United Standard, and that company have been contractually bound to pay it to the Guardian Royal Exchange Assurance Ltd who in turn would have been bound to pay it to Mr Marlowe is clear ...

[123] Similarly, in the instant case, since the defendant has brought Suit 846 against Superview and SYABAS, to claim for the damage to his house, he has made a double claim for the damage to his house and, therefore, he is bound to pay back the said sum of RM530,000 to the plaintiff.

CONCLUSION

[124] Based on the reasons as set out above, the conclusion of the court can be summarised as follows.

[125] There is no dispute that the said sum of RM530,000 was paid to and received by the defendant for the loss/damage to the house.

[126] Pursuant to the doctrine of subrogation, the plaintiff is entitled in law to recover the said sum of RM530,000 that was paid by the plaintiff to the defendant.

[127] Based on the evidence before the court, the defendant's contentions that the said sum of RM530,000 is not part of the sum of RM800,000 that was received by him in Suit 846 is without any basis.

[128] Therefore, the plaintiff's suit and claim against the defendant ought to be allowed with cost.

[129] In the premises, the court allowed the plaintiff's suit and claim against the defendant with cost of RM25,000.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundram